

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH

In the Matter of
Stop & Save Food Market
WIC Vendor No. W6969

**RECOMMENDATION ON
MOTION FOR
SUMMARY DISPOSITION**

The Department of Health made an oral motion for summary disposition at the hearing on June 25, 1998. Bobby J. Champion, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, is the attorney representing the Department. Mohammed Ali Alkhatib, owner of Stop & Save Food Market, 3345 Nicollet Avenue South, Minneapolis, Minnesota 55408, is not being represented by an attorney, but rather is representing himself. The record closed on the date of the hearing.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Health will make the final decision after reviewing the record. The Commissioner may adopt, reject or modify this recommendation. Under Minnesota law,^[1] the Commissioner may not make her final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file objections and present argument to her. Parties should contact the office of Anne Barry, Commissioner, Department of Health, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440, to find out how to file objections or present argument.

After considering everything in the administrative record, the Administrative Law Judge HEREBY RECOMMENDS:

- (1) That the Commissioner GRANT the Department's Motion for Summary Disposition; and
- (2) That the Commissioner consider this proceeding to be one for disqualification of a vendor rather than one for denial of an application.

(3) That the Commissioner apply an appropriate penalty to Stop & Save Food Market.

Dated this 2nd day of July, 1998.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

This contested case proceeding was initiated by a Notice of and Order for Hearing dated June 10, 1998, which set a hearing date of June 25, 1998. The issue is whether the vendor maintained store hours as required by rule. During a prehearing telephone conference on June 18, 1998 with the Respondent and the Department's attorney, it became clear that neither party felt there was any dispute as to the facts of this case. Accordingly, the matter was set for oral argument on the hearing date, June 25, 1998, and the record closed on that date. This case is, therefore, a motion by the Department of Health for summary disposition. At the oral argument, the Department submitted exhibits and each party argued the appropriate disposition of this matter. Since no testimony was taken, the motion to protect the identity of the investigator became moot or unnecessary to decide.

The Department's Burden

In considering motions for summary disposition in administrative contested case proceedings, administrative law judges have adopted the standards developed in district court practice for considering motions for summary judgment.^[2] Like summary judgment, summary disposition is appropriate "where there is no genuine issue as to any material fact."^[3] When the party making the motion has the burden of proof, that party must initially show facts establishing that it will succeed unless the other party is able to contradict those facts. The moving party must also indicate there are no material fact issues that the parties must prove by submitting evidence.^[4] Once the moving party has established those things, the burden of proof shifts to the party not making the motion.^[5] That party must then specifically show that some facts are in dispute that will have a bearing on the outcome and that will have to be established by evidence submitted by the parties.^[6] The party not making the motion cannot just claim there are disputed facts.^[7]

In this case, the parties have agreed that there are no facts in dispute. It is, therefore, appropriate for the Administrative Law Judge and the Commissioner to resolve this matter without a fact-finding hearing by applying the law to the acknowledged facts.

Underlying Facts

Stop & Save Food Market has been a food vendor in the WIC program for approximately six years. Vendors must reapply every two years and Stop & Save submitted its application for vendor reauthorization in November of 1997. Exhibit 1. This caused the Department to commence an investigation of the Respondent in order to determine if its reapplication should be approved. Department investigators visited the Respondent on April 3, 1998 at 10:40 a.m. and noted that the store was closed and the posted sign indicated it opened at 11:00 a.m. Ex. 4. An investigator visited the store again on April 14, 1998 at 10:40 a.m. and found that the store was closed. Ex. 5. On April 21, 1998, the investigator again visited the store and found the store closed at 10:32 a.m. Ex. 6.

The Department sent Mr. Alkhatib a letter dated April 30, 1998, advising him that it was disapproving his application as a WIC vendor because on three separate occasions in April his store was found to be closed for business between 10:00 a.m. and 11:00 a.m. The Department then advised the Respondent of its appeal rights. Ex. 3. Mr. Alkhatib sent a letter which was received by the Department on May 7, 1998 which expressed his surprise at being requested to turn back in his WIC license due to an hours violation, since he was open more than 66 hours a week. Mr. Alkhatib did indicate in the letter that he would like to retain opening at 11:00 a.m., but that if he could not, he would change his hours to fit the WIC requirements. The Department treated the letter as a request for an appeal hearing. Ex. 5.

Stop & Save Food Market was also the subject of a vendor monitoring visit on March 23, 1998. The WIC representative identified several violations which were reported to Mr. Alkhatib in a summary report. One of the violations was that store hours were not in compliance with the requirement to be open from 10:00 a.m. to 6:00 p.m. Monday through Saturday. Ex. 8. The WIC compliance specialist sent a follow-up letter to Mr. Alkhatib on March 31, 1998, in which he discussed most of the violations, but not the store hours requirement. Ex. 9.

The WIC Retail Food Vendor Guaranty signed by Mr. Alkhatib in September of 1997 specifically provides that the vendor shall operate at least Monday to Friday 10:00 a.m. to 4:00 p.m. Ex. 2.

Applicable Law

Minn. Rule pt. 4617.0067, subp. 4A provides as follows:

A vendor must be open to the public for business at least Monday through Saturday, 10:00 a.m. to 6:00 p.m., unless the commissioner determines that the vendor needs to be open for business during different hours because of a religious or cultural reason.

There is no dispute here that the Respondent has not applied to the Commissioner for different business hours and that the Commissioner has made no determination that the Respondent may vary from the requirements of the rule. The Respondent concedes that he has been opening later than the 10:00 a.m. opening time set out in the rule. The Department argued at the hearing that since this is an application to be a food vendor in the WIC program, it is required to disapprove the application if a rule violation is found.

The Respondent points out that because he is open from 11:00 a.m. to 9:00 p.m. daily, the total number of hours he is open far exceeds that required by the rule. He states that there have been no complaints from the public in his community about his store hours. He suggests that this is a small violation which does not justify the loss of his food vendor license. The Respondent indicated at the hearing, as it did in its appeal notice, that if necessary it would change its opening time to 10:00 a.m.

The Department has established a technical violation of the rule. A WIC vendor is presumed to know the rules which govern the program and signs a guarantee which outlines the significant rules. Nonetheless, the only direct evidence of notice of an hour violation to Mr. Alkhatib in this record is the vendor monitoring summary report which he signed. The summary report does have business hours checked as a violation, among several others. Mr. Alkhatib does not recall discussing the hours problem with the investigator who visited his store and it does not appear to be mentioned in the follow-up letter sent to Mr. Alkhatib dated March 31, 1998. The Department did not list any other violations as grounds for denial of the application.

It is recommended that the Commissioner treat this proceeding as one for disqualification rather than denial of an application. This is appropriate when a vendor has been a member of the program for over six years and is merely reapplying. In this circumstance, denial of the application is tantamount to disqualification of the existing vendor privileges. The Department asserts that it could have started either a denial or a disqualification in this case. It is appropriate that a first-time applicant assume the burden of proof; however, the Department should bear the burden when it seeks to remove a privilege.^[8] A disqualification proceeding permits the Commissioner greater flexibility in applying an appropriate penalty. Disapproval or disqualification is not required. That flexibility is appropriate in this case where the record indicates only a technical violation which the Respondent is apparently willing to remedy at this point. It is, therefore, recommended that the Commissioner apply an appropriate penalty since the rules apparently do not specify one, and direct that the Respondent conform its store hours to the rule in the future.

GAB

^[1] Minn. Stat. § 14.61 (1996). (Unless otherwise specified, citations to Minnesota Statutes refer to the 1996 edition.)

^[2] See Minn. Rules, pt. 1400.6600.

^[3] Minn. Rules, pt. 1400.5500(K); compare Minn. R. Civ. P. 56.03; Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988).

^[4] Id.

^[5] Minnesota Mutual Fire and Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990).

^[6] Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

^[7] Id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

^[8] In Re City of White Bear Lake, 311 Minn. 146, 247 N.W.2d 901 (1976).